

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Gray, Jan DBA = KZMX)	File No.: EB-FIELDWR-13-00006467
)	NAL/Acct. No.: 201432800002
Registrant of Antenna Structure Registration)	FRN: 0008230559
Number 1063709)	
Hot Springs, South Dakota)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 22, 2014**Released: January 22, 2014**

By the District Director, Denver Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Gray, Jan DBA = KZMX (Mr. Gray), registrant of antenna structure registration number 1063709 in Hot Springs, South Dakota (Antenna Structure), apparently willfully and repeatedly violated Section 303(q) of the Communications Act of 1934, as amended (Act), and Sections 17.48(a) and 17.51(a) of the Commission's rules (Rules),¹ by failing to exhibit required red obstruction lighting on the Antenna Structure and notify immediately the Federal Aviation Administration (FAA) of the light outage. We conclude that Mr. Gray is apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000).

II. BACKGROUND

2. The Antenna Structure is 90.0 meters in height above ground and is required to be painted and display a red flashing beacon at the top level and two steady red burning lights at the mid level.² On January 22 and 23, 2013, an agent from the Enforcement Bureau's Denver Office (Denver Office) observed that the Antenna Structure was completely unlit after sunset.³ Later in the evening of January 22, 2013, the agent from the Denver Office contacted the FAA and learned that no Notice to Airmen (NOTAM) had been issued for the Antenna Structure.⁴ On January 31, 2013, the Denver agent was able to make telephone contact with Mr. Gray, who indicated that he was not aware of the Antenna Structure's light outage. The Denver agent gave Mr. Gray the NOTAM number and its expiration information.

3. On February 8, 2013, in response to a request from the Denver Office to observe the lighting on the Antenna Structure, the Hot Springs, South Dakota, Police Department confirmed that the lights on the Antenna Structure were not functioning after sundown on February 7, 2013. Later that day, a

¹ 47 U.S.C. § 303(q); 47 C.F.R. §§ 17.48(a), 17.51(a).

² See Antenna Structure Registration database for antenna structure number 1063709. See also 47 C.F.R. § 17.21 (requiring antenna structures more than 60.96 meters in height to be painted and lighted).

³ Local sunset on January 22 and 23, 2013 was approximately 4:50 P.M. local time.

⁴ See 47 C.F.R. § 17.48 (requiring tower owners to notify the FAA immediately of any known outages of tower lighting lasting more than 30 minutes). The agent informed the FAA of the light outage and the FAA issued a NOTAM for the Antenna Structure on January 22, 2013.

Denver agent searched the FAA NOTAM website and determined that the initial NOTAM, which he had sponsored for the Antenna Structure, had expired on February 7, 2013, and that Mr. Gray had not renewed or requested a new NOTAM. The agent requested a new NOTAM for the Antenna Structure.

4. On February 26, 2013, the Denver Office issued Mr. Gray a Notice of Violation (*NOV*) for failing to exhibit red obstruction lighting from sunset to sunrise and failing to notify the FAA of the light outage.⁵ On February 28, 2013, Mr. Gray contacted the Denver Office by telephone to report that the lights on the Antenna Structure were operational, and had been repaired approximately two weeks earlier. On March 14, 2013, Mr. Gray submitted a response to the *NOV*⁶ stating that the lighting system repairs for the Antenna Structure were successful and that “light was restored on February 13, 2013.” Mr. Gray added that the light had continued to function since the February 13, 2013, repairs and that “the matter had been reported to the National FAA Center.”⁷

III. DISCUSSION

5. Section 503(b) of the Act, provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation, or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁸ Section 312(f)(1) of the Act defines “willful” as the “conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁹ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁰ and the Commission has so interpreted the term in the Section 503(b) context.¹¹ The Commission may also assess a forfeiture for violations that are merely repeated, and not

⁵ *Gray, Jan DBA = KZMX*, Notice of Violation, V201332800041 (Feb. 26, 2013) (on file in EB-FIELDWR-13-00006467).

⁶ See Letter from Jan Charles Gray, President and CEO, Mt. Rushmore Broadcasting, Inc., to Nikki P. Shears, District Director, Denver Office, Western Region, Enforcement Bureau (Mar. 14, 2013) (on file in EB-FIELDWR-13-00006467)(*NOV Response*).

⁷ *NOV Response* at 2. On April 4, 2013, a Denver agent conducted both day and nighttime inspections of the Antenna Structure. The nighttime observation found that the tower’s top beacon was flashing, however, one of the two mid-level red lights was extinguished.

⁸ 47 U.S.C. § 503(b).

⁹ 47 U.S.C. § 312(f)(1).

¹⁰ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982) (“This provision [inserted in Section 312] defines the terms ‘willful’ and ‘repeated’ for purposes of section 312, and for any other relevant section of the act (e.g., Section 503) As defined[,] . . . ‘willful’ means that the licensee knew that he was doing the act in question, regardless of whether there was an intent to violate the law. ‘Repeated’ means more than once, or where the act is continuous, for more than one day. Whether an act is considered to be ‘continuous’ would depend upon the circumstances in each case. The definitions are intended primarily to clarify the language in Sections 312 and 503, and are consistent with the Commission’s application of those terms . . .”).

¹¹ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

willful.¹² The term “repeated” means the commission or omission of such act more than once or for more than one day.¹³

A. Failure to Exhibit Required Red Obstruction Lighting on the Antenna Structure and Notify the FAA of the Light Outage

6. Section 303(q) of the Act states that antenna structure owners shall maintain the painting and lighting of antenna structures as prescribed by the Commission.¹⁴ Section 17.51(a) of the Rules states that “[a]ll red obstruction lighting shall be exhibited from sunset until sunrise unless otherwise specified.”¹⁵ Section 17.48(a) of the Rules states that owners of antenna structures “shall report immediately by telephone or telegraph to the nearest Flight Service Station or office of the Federal Aviation Administration any observed or otherwise known extinguishment or improper functioning of any top steady burning light or any flashing obstruction light, regardless of its position on the antenna structure, not corrected within 30 minutes”¹⁶

7. The evidence in this case is sufficient to establish that Mr. Gray violated Section 303(q) of the Act and Sections 17.48(a) and 17.51(a) of the Rules. The Antenna Structure is required to display red obstruction lighting at night.¹⁷ On January 22 and 23, 2013, an agent from the Denver Office inspected the Antenna Structure and observed that all red obstruction lighting was extinguished after sunset. Mr. Gray became aware of the light outage on January 31, 2013,¹⁸ but did not notify the FAA of the outage even after the NOTAM, sponsored by a Denver agent, expired on February 7, 2013, resulting in the agent sponsoring a second NOTAM. Based on the evidence before us, we find that Mr. Gray apparently willfully and repeatedly violated Section 303(q) of the Act and Sections 17.48(a) and 17.51(a) of the Rules by failing to exhibit required red obstruction lighting after sunset and notify the FAA immediately of a known light outage.

B. Proposed Forfeiture

8. Pursuant to the Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules, the base forfeiture amount for failing to comply with prescribed lighting is \$10,000.¹⁹ In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act, which include the nature, circumstances, extent, and gravity of the violations, and

¹² See, e.g., *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, para. 10 (2001) (*Callais Cablevision, Inc.*) (proposing a forfeiture for, *inter alia*, a cable television operator’s repeated signal leakage).

¹³ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” See *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362.

¹⁴ 47 U.S.C. § 303(q).

¹⁵ 47 C.F.R. § 17.51(a).

¹⁶ 47 C.F.R. § 17.48(a).

¹⁷ See *supra* note 2.

¹⁸ Mr. Gray informed the Denver Office that he had an associate monitoring the lights on the Antenna Structure for him. *NOV Response* at 1.

¹⁹ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.²⁰ Applying the *Forfeiture Policy Statement*, Section 1.80 of the Rules, and the statutory factors to the instant case, we conclude that Mr. Gray is apparently liable for a total forfeiture in the amount of \$10,000.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.204, 0.311, 0.314, and 1.80 of the Commission's rules, Gray, Jan DBA = KZMX is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for violations of Section 303(q) of the Act and Sections 17.48(a) and 17.51(a) of the Commission's rules.²¹

10. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission's rules, within thirty (30) calendar days of the release date of this Notice of Apparent Liability for Forfeiture, Gray, Jan DBA = KZMX **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account number and FRN referenced above. Gray, Jan DBA = KZMX shall also send electronic notification on the date said payment is made to WR-Response@fcc.gov. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²² When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th

²⁰ 47 U.S.C. § 503(b)(2)(E).

²¹ 47 U.S.C. §§ 303(q), 503(b); 47 C.F.R. §§ 0.111, 0.204, 0.311, 0.314, 1.80, 17.48(a), 17.51(a).

²² An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

Street, S.W., Room 1-A625, Washington, D.C. 20554.²³ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to Sections 1.16 and 1.80(f)(3) of the Rules.²⁴ Mail the written statement to Federal Communications Commission, Enforcement Bureau, Western Region, Denver Office, P.O. Box 25446, DFC Building 1A, One Denver Federal Center, Lakewood, Colorado, 80225 and include the NAL/Acct. No. referenced in the caption. Gray, Jan DBA = KZMX also shall e-mail the written response to WR-Response@fcc.gov.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by both Certified Mail, Return Receipt Requested, and first class mail to Gray, Jan DBA = KZMX at P.O. Box 446, Custer, South Dakota, 57730.

FEDERAL COMMUNICATIONS COMMISSION

Nikki P. Shears
District Director
Denver Office
Western Region
Enforcement Bureau

²³ See 47 C.F.R. § 1.1914.

²⁴ 47 C.F.R. §§ 1.16, 1.80(f)(3).